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IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *ET AL.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES INC., THE ARC OF THE UNITED STATES AND TASH IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Review by This Court Should Be Granted to Protect IDEA and to Resolve the Split Among the Circuits.	3
II. This Court Should Also Grant Certiorari Because the Present Circuit Split Disproportionately Affects Poor Families.	7
A. Disabled Children Are Over-Represented Among Poor Populations in the United States.	7
B. Parents Who Proceed *Pro Se* Are Often Unable to Find Lawyers.	9
C. Whether Parents May Represent Themselves and Their Children with Disabilities *Pro Se* Should Not Depend on the Family's Address.	12
D. The Court Should Grant Certiorari to Clarify that Parents Are Not Engaged in Unauthorized Practice of Law.	13
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 438 U.S. 176 (1982) 4, 5, 8, 14

Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 12

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005), *reh'g denied*, 2005 U.S. App. LEXIS 12384 (6th Cir. June 15, 2005) 5

Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998) 4, 5, 6, 9, 12

C.O. v. Portland Pub. Sch., 406 F. Supp. 2d 1157 (D. Or. 2005) 4

Devine v. Indian Ridge County Sch. Bd., 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) 4, 7, 8

Faretta v. California, 422 U.S. 806 (1975) 5

Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992) ... 6

Honig v. Doe, 484 U.S. 305 (1988) 3

In re Arons, 756 A.2d 867 (Del. 2000) 13

Cited Authorities

Page

Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380 (4th Cir. 2000) 3

Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247 (1st Cir. 2003) ..... *passim*

Martinez v. Court of Appeal, 528 U.S. 152 (2000) ... 9

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

Mosley v. Chicago Bd. of Educ., 434 F.3d 527 (7th Cir. 2006) 4

Navin v. Park Ridge Sch. Dist., 270 F.3d 1147 (7th Cir. 2001) 4

Schaffer v. Weast, 126 S. Ct. 528 (2005) 6, 7

Tcherepnin v. Knight, 389 U.S. 332 (1967) 6

Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999) 4

Statutes:

20 U.S.C. § 1400-1487 2

20 U.S.C. § 1400(c) 6

Cited Authorities

	Page
20 U.S.C. § 1400(d)	6
20 U.S.C. § 1415	6
28 U.S.C. § 1654	5
Rule:	
Fed. R. Civ. P. 17(c)	7
Other Authorities:	
American Bar Association, *Agenda For Access: The American People and Civil Justice*, 5 (1996)	9
Melanie Archer, *Access and Equity in Due Process, Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (Dec. 2002) <http://www.dueprocessillinois.org/AccessDP.htm>	11
M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005)	7
Handicapped Children's Protection Act of 1986, S. Rep. No. 99-112 (1986)	13
Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519 (2003)	8

Cited Authorities

Page

Income Level for Individuals Eligible for Assistance, 71 Fed. Reg. 5,012 (2006) 9

Individuals with Disabilities Education Act (IDEA) Data (visited March 30, 2006) <https://www.ideadata.org/tables28th/ar_1-1.htm> 13

National Council on Disability, *Back to School on Civil Rights* (Jan. 25, 2000), *http://www.ncd.gov/newsroom/publications/2000/*backtoschool_1.htm> 6

National Disability Rights Network (visited March 30, 2006) *http://www.NAPAS.org/aboutus/*PA_CAP.htm 10

Mary Wagner *et al.*, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002) <http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf> 8, 9

INTEREST OF AMICI CURIAE

The Council of Parent Attorneys and Advocates Inc. (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes that the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation or advocacy for children with disabilities but provides training and resources for parents and attorneys to help each child obtain the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act ("IDEA").[1]

The Arc of the United States is the oldest and largest national organization for people with mental retardation and related developmental disabilities and their families. It was founded in 1950 by a group of parents and other concerned individuals, primarily to procure services for children who were denied a public school education. Today, *The Arc* works to ensure that the estimated 7.2 million Americans with mental retardation and related developmental disabilities have the services they need, including FAPE, in order to grow, develop and live in communities across the nation.

TASH is an international membership organization of people with disabilities, their family members, other

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1. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for either party has authored this brief, in whole or in part, and no person or entity other than *amici curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advocates and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

Amici have a common interest in this case: concern over the limited number of attorneys available to represent children with disabilities in IDEA proceedings, and whether the rights of parents to represent their own IDEA interests *pro se* are being abridged.

SUMMARY OF ARGUMENT

Lack of access to counsel should not prevent access to the courts. In IDEA, Congress created rights for both children with disabilities and their parents, because the children are uniquely reliant upon their parents to enforce their rights. 20 U.S.C. § 1400-1487. Through IDEA, Congress gave children with disabilities the right to FAPE. Administrative due process proceedings under IDEA give parents the right to challenge school determinations about whether their children are receiving FAPE.

It is the ability of parents to appeal these due process determinations in court which concerns amici writing in support of Petitioner in this case. If parents are unable to appeal to the courts due to a lack of financial or practical access to qualified counsel, then the rights granted through IDEA are empty, and Congress' intent is ignored. Amici have seen first-hand how constituents are hampered in protecting their rights, because of where they live and their inability to find qualified counsel. Now, parents of children with disabilities are being told there is no access to justice if they are unable to find an attorney who they can afford or who will represent their interests *pro bono*.

The Sixth Circuit has ignored the plain language of IDEA and the historical importance given to *pro se* representation. Most egregiously, the Winkelmans are being investigated for unauthorized practice of law, simply because they attempted to pursue those IDEA rights granted to them and their son in court without benefit of legal counsel. This Court has the unique ability to recognize that true access to justice requires much more than having the ability to pay for a lawyer or to find a lawyer who will work *pro bono*.

ARGUMENT

I. Review by This Court Should Be Granted to Protect IDEA and to Resolve the Split Among the Circuits.

IDEA gives parents of children with disabilities the right to file an appeal in any state or federal court against any FAPE decision they believe to be inappropriate. *Honig v. Doe*, 484 U.S. 305, 311-312 (1988). Supreme Court review is therefore necessary in this case to resolve a substantial conflict on two issues: whether parents of children with disabilities can pursue procedural IDEA rights in court *pro se*, and whether parents can pursue substantive IDEA rights *pro se*.

The Sixth Circuit has held that parents can do neither. This decision is in stark contrast to rulings of other Circuit Courts of Appeal. The First Circuit has held, and the Fourth Circuit has assumed, that parents can pursue both procedural and substantive IDEA rights *pro se*. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 250-58 (1st Cir. 2003); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 383 (4th Cir. 2000). The Second Circuit and a divided Third Circuit have held that *pro se* parents can pursue only

procedural IDEA rights. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998).[2] The Eleventh Circuit has stated in dicta that parents can proceed on their own behalf, without elaborating on the procedural versus substantive distinction. *Devine v. Indian Ridge County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). The Seventh Circuit initially held the same way, *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (7th Cir. 2001), and appears to have subsequently adopted the First Circuit's approach. *See Mosley v. Chicago Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006).[3]

Parental involvement is integral to protect individual children's rights, *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 438 U.S. 176, 208 (1982), but as a result of this circuit split, IDEA now applies differently in different parts of the country. At its simplest level, the decision below precludes federal court review of IDEA claims for those parents unable to pay or to find qualified *pro bono* counsel and thus, has an unfairly discriminatory effect. Those who can afford a lawyer or who are otherwise able to retain an attorney remain unimpeded.

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2. Judge Roth dissented from the panel's decision in *Collinsgru*, arguing that a parent can pursue both sets of rights *pro se*. 161 F.3d at 237.

3. Although the Ninth Circuit has not ruled on this issue, two district courts in that circuit have come to opposite conclusions. *See D.K. v. Huntington Beach School District*, Case No. SACV 05-341-CJC (RNBx) (C.D. Cal. Mar. 22, 2006), which follows *Maroni*; *C.O. v. Portland Pub. Sch.*, 406 F. Supp. 2d 1157, 1169 (D. Or. 2005), which follows *Collinsgru*.

The Sixth Circuit clearly erred in denying the Winkelmans' right to proceed *pro se* in prosecuting their own procedural rights under IDEA. The right to represent one's self in legal proceedings is deeply ingrained in U.S. jurisprudence and pre-dates the Constitution. *Faretta v. California*, 422 U.S. 806, 830 n.37 (1975). A federal statute currently authorizes parents to act *pro se* in federal court. 28 U.S.C. § 1654 (2006). Six other circuits have held or suggested that parents of children with disabilities can appear *pro se* in federal court, at the very least to protect procedural rights, because IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court." *Collinsgru*, 161 F.3d at 233.[4]

The Sixth Circuit also erred in denying the Winkelmans the right to pursue substantive IDEA rights *pro se*. As this Court has recognized, IDEA's procedural protections are based on "the legislative conviction that adequate compliance with the procedures presented would in most cases assure much, if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. This artificial distinction between procedural versus substantive rights is thus inimical to the meaning and purpose of IDEA. Congress placed as much emphasis on compliance with procedures giving parents a large measure of participation, as it did on measuring the resulting Individualized Education Program

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4. Unfortunately for the Winkelmans, the court below ruled against them without analysis, citing to a prior decision, *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), *reh'g denied*, 2005 U.S. App. LEXIS 12384 (6th Cir. June 15, 2005). However, the *Cavanaugh* decision holds only that parents may not represent their children *pro se*. *Id.* at 756.

("IEP") against a substantive standard. *Id.*; *Schaffer v. Weast*, 126 S. Ct. 528, 535 (2005).

IDEA is a remedial statute, which should be liberally construed. 20 U.S.C. § 1400(c), (d); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). It protects substantive rights through procedural protections: "IDEA's procedural guarantees serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA. Congress addressed the problem of how to guarantee substantive rights to a diverse group by relying on a process-based solution." *Maroni,* 346 F.3d at 255, citing *Heldman v. Sobol*, 962 F.2d 148, 155 (2d Cir. 1992).

Substantively, IDEA creates rights between parents and their children that "are overlapping and inseparable." *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting). IDEA explicitly guarantees FAPE to children with disabilities, and parents are given enforcement rights to ensure their children receive FAPE. 20 U.S.C. §§ 1400(d), 1415; National Council on Disability, *Back to School on Civil Rights* (Jan. 25, 2000), *http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm*>. Even when pursuing their own rights they are acting for their children, because parents are responsible for their children's education. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). IDEA's procedural and substantive rights are, therefore, "inextricably intertwined." *Maroni,* 346 F.3d at 255.

By holding that the express language of IDEA views these rights as "joint rights," the First Circuit has given proper effect to Congress' intent. *Id.* at 249. If parents can pursue IDEA's procedural rights *pro se* – and they plainly can – they should also be allowed to pursue *pro se* those IDEA

substantive rights which the procedural rights seek to protect. Parents who appeal decisions affecting their children's rights to FAPE (procedural violations), and parents who challenge the content of FAPE decisions (substantive violations), are "parties aggrieved" within the meaning of the statute and are empowered by IDEA to appear *pro se*. *Id.* at 250.

II. This Court Should Also Grant Certiorari Because the Present Circuit Split Disproportionately Affects Poor Families.

Many mothers and fathers of children with disabilities are forced to proceed *pro se* because they either have no money or have run out of money to pay for a lawyer. *See, e.g., Devine,* 121 F.3d at 578 n.5. Even the most affluent parents may have difficulty in retaining counsel because of the paucity of attorneys knowledgeable in litigating IDEA claims. *See* M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 892 (2005). Often, parents are unable to find a lawyer with both the expertise and the willingness to work for free.

A. Disabled Children Are Over-Represented among Poor Populations in the United States.

Today, almost seven million school-aged children with disabilities have the right to FAPE under IDEA. *Schaffer,* 126 S. Ct. at 531. However, no child who challenges a hearing officer's determination of the appropriateness of an IEP, contests the denial of an IEP, or defends against a school district's appeal to change the terms of an IEP, is permitted to make any decisions in court. Proceedings must be brought on the child's behalf by a representative, next friend or guardian *ad litem*. Fed. R. Civ. P. 17(c).

This Court has stated that parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled" under IDEA. *Rowley*, 458 U.S. at 209. Some children with disabilities are fortunate enough to have parents who, as licensed attorneys, can plead their case in federal court. *See Devine*, 121 F.3d at 581 n.18. For the great majority of children with disabilities, however, "[a]rdor in the face of large attorneys' bills is naturally tempered." Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519, 547 (2003).

Special education disabilities have long been linked to poverty and minority status. *See* Mary Wagner *et al.*, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002) <http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf>. There is a higher percentage of lower income families with children with disabilities than among families in the general population, even though in both cases, parents are equally likely to be employed. *Id.* at 12, 28-29, 32, 40. There is also disproportionate representation of some minorities in special education among elementary and middle school students. *Id.* at 12. Well over one third (39%) of students with disabilities, including Jacob Winkelman, live in households where another family member is also disabled. *Id.* at 19.

Equally striking are the statistics showing that although 70% of the almost seven million students with disabilities live in households with two parents, over two thirds (67.8%) of them, or more than 4.5 million children, belong to families living on an income of less than $50,000 a year. *Id.* at 28-29.

For about two million (35%) of these students, the annual family income is less than $25,000. *Id.*

Households with incomes just above the eligibility line for publicly-funded legal services are particularly disadvantaged. American Bar Association, *Agenda For Access: The American People and Civil Justice,* 5 (1996). Legal Services Corporation, for example, requires a family of four living in the contiguous forty-eight states to have an annual income of $20,750 or less to qualify for assistance. *Income Level for Individuals Eligible for Assistance*, 71 Fed. Reg. 5,012 (2006). As a result, less than a quarter of the overall population of children with disabilities (23.6%) in the United States are officially considered to be "living in poverty." *The Children We Serve,* at 29. The remaining families of children with disabilities in this country who live on less than $50,000 a year (or approximately three million children), probably do not qualify for subsidized legal assistance, "and yet seldom are able to afford help from the private bar." *Agenda For Access* at 5.

B. Parents Who Proceed *Pro Se* Are Often Unable to Find Lawyers.

The right to self representation was first recognized at a time when geographic disparity meant litigants could not necessarily obtain the services of a lawyer. *Martinez v. Court of Appeal,* 528 U.S. 152, 156-57 (2000). The highly specialized nature of IDEA cases has resulted in the scarcity of qualified legal counsel. *Collinsgru,* 161 F.3d at 236. The First Circuit decision in *Maroni,* for example, contains extensive discussion on the inability of various state Protection and Advocacy (P&A) agencies to provide full

representation in all but a few cases. *Maroni*, 346 F.3d at 258 n.9.[5]

Recent data from the P&A discussed in *Maroni* indicates the situation has not improved. The Disability Law Center in New Hampshire reports that between October 1, 2004 and September 30, 2005, it was only able to provide legal representation for twenty parents out of a total of 494 special education matters. Similarly, for the 2005 fiscal year, the Arizona Disability Law Center received a total of 1,627 requests for assistance but was only able to provide help in 225 of those cases. Of the 852 cases received in Alaska since 2003, only 9% were handled by an attorney.[6]

Comparable statistics exist in the Sixth Circuit. Between October 1, 1999 and January 31, 2006, the Michigan Protective and Advocacy Services (MPAS) reports that it received 10,399 requests on special education issues but was only able to provide direct representation in 17% of those cases. In Ohio, where the Winkelmans live, the lack of resources at the Ohio Legal Rights Services (OLRS) means that of the 683 requests it received from October 2004 to September 2005, it was able to provide representation in fifty-eight, or less than 10%, of those cases. OLRS also reports that during the past eight months, out of the eighty-

5. The P&A System is a congressionally mandated network of disability rights agencies located throughout the United States that have the authority to provide legal representation to individuals with disabilities, based on a priority system for services. *See* National Disability Rights Network (visited March 30, 2006) *http://www.NAPAS.org/aboutus/PA_CAP.htm*.

6. Affidavits for P&A data reported above are on file with counsel of record.

three requests for due process hearings, parents represented themselves and their children *pro se* in fifty-eight (approximately 70%) of those proceedings because they could not afford representation, could not qualify for representation or could not find *pro bono* or other free representation.[7]

There is a nationwide shortage of attorneys in private or not-for-profit practices who are experienced in IDEA cases, as evidenced by the miniscule numbers of counsel either identified on referral lists or actually representing children with disabilities and their parents in administrative hearings. *See, e.g.*, Melanie Archer, *Access and Equity in Due Process, Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (Dec. 2002) <http://www.dueprocessillinois.org/AccessDP.htm>; *Maroni,* 346 F.3d at 258 n.9. In the Sixth Circuit, MPAS reports that it lists only two private attorneys on its referral list and for eighty-two out of its eighty-three counties in Michigan, including the ten most populous cities, no private attorneys are listed. Similarly, COPAA lists only seven attorney members in Ohio, ten in Michigan, eight in Tennessee and none in Kentucky. None of the six attorneys listed by Kentucky P&A are willing to accept cases in Western Kentucky.

If legal representation is not available and the parents are not allowed to act *pro se,* then irrespective of valid grounds for appeal, the rights granted by IDEA become worthless. Although the parent can transfer rights at the child's majority under IDEA, these rights lose substantially all of their value if not pursued promptly, since it is not money but a change in present educational circumstances that is

7. Kentucky P&A and the Disability Law and Advocacy Center of Tennessee report similar statistics.

being pursued. *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting).

C. Whether Parents May Represent Themselves and Their Children with Disabilities *Pro Se* Should Not Depend on the Family's Address.

Pro se parents acting on behalf of their children with disabilities may not be legally trained advocates, but it is better for the children than having no advocate at all. *Maroni*, 346 F.3d at 258. The geographic imbalance that currently exists due to the current circuit split is more than simply the injustice of Jacob Winkelman not being represented by his parents *pro se* because they live in the Sixth Circuit rather than the First Circuit. As IDEA gives jurisdiction to both state and federal courts, if Jacob lived in a state other than Ohio, his parents could possibly sue in state court *pro se* as his next friend.[8] Unfortunately, the local school authority could then remove the case to federal court and secure a dismissal, simply because in some circuits, parents must retain an attorney to represent their children with disabilities. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695-97 (2003) (removal is permissible where jurisdiction expressly lies in both federal and state court, even if it interferes with the plaintiff's choice of forum).

Congress could not have intended children with disabilities and their parents to be barred from proceeding when a school's legal counsel makes certain strategic choices of forum. Financial status or the ability to find qualified counsel should not be deciding factors in the right of appeal.

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8. As discussed in *Maroni*, New Hampshire has such a law. 346 F.3d at 258 n.11.

As the First Circuit explained, "such an outcome subverts Congress's original intent [in the precursor statute to IDEA] . . . that due process procedures, including the right to litigation if that became necessary, be available to all parents." *Maroni*, 346 F.3d at 258, citing *Handicapped Children's Protection Act of 1986*, S. Rep. No. 99-112, at 2 (1986).

D. The Court Should Grant Certiorari to Clarify that Parents Are Not Engaged in Unauthorized Practice of Law.

There are over a quarter of a million children with disabilities living in Ohio who are subject to IDEA. *See* Individuals with Disabilities Education Act (IDEA) Data (visited March 30, 2006) <https://www.ideadata.org/tables28th/ar_1-1.htm>.[9] A frightening prospect for Ohio families is that parental ardor to ensure a child with disabilities receives FAPE could also result in punishment by the State. The Cleveland Bar Association has recently initiated an investigation as to whether the Winkelmans' *pro se* representation of their son's IDEA claims in the lower court constituted the unauthorized practice of law. *See Petitioner's Supplemental Brief*, 1 (March 30, 2006.)

This investigation against the Winkelmans is not well founded in law or reason. As the Delaware Supreme Court's discussion in *In re Arons*, 756 A.2d 867, 874 (Del. 2000) suggests, any prosecution of the Winkelmans for the unauthorized practice of law would not be in keeping with

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9. Table 1-1 of this data shows the number of children subject to IDEA by state and age group. The total of all age groups in Ohio in 2004 was 260,710.

the established reasoning for the State's interest in policing such matters, which is to protect the public from unscrupulous non-lawyer representation. In sharp contrast, IDEA actively promotes the parent as the child's advocate. *Rowley*, 458 U.S. at 208.

It is unfathomable that the Winkelmans may be prosecuted when there is such a divergence of opinion among the circuits. The potential for such actions serves as a significant deterrent to *pro se* parents seeking enforcement of their children's IDEA rights in court. It also drastically underscores both the importance of the issue presented and the need for this Court to grant certiorari and resolve the circuit split on this issue.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Respectfully submitted,

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